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No. 83-1393

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
PETITIONER

v.

LARRY WAYNE CASSITY, BILLY SWORD AND
STEPHEN GORDON LENK

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Whether the warrantless monitoring of signals from a beeper installed inside containers of chemicals and equipment that law enforcement authorities reasonably believe will be used to manufacture illegal drugs violates the Fourth Amendment when the monitoring occurs while the beeper is located within a home and indicates by it's signals not only the presence of the chemicals and equipment in the home, but also that the equipment is being utilized.

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Respondents by and through their counsel of record oppose and submit that Petitioner's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit be denied.

JURISDICTION

Respondents oppose the Petitioner's assertion that this Court has jurisdiction. Respondents contend that the Government's Petition is out of time. The judgment of the Court of Appeals (Petitioner's App. 49a) was entered on Ocrober 31, 1983. The Government's motion to hold cause in abeyance pending decision in related Supreme Court case was denied on December 23, 1983 (Petitioner's App. 50a). The Government's motion for an Order Nunc Pro Tunc treating earlier motions to hold case in abeyance as a

petition for rehearing was denied on January 25, 1984 (Petitioner's App. 51a).[1]

STATEMENT OF THE CASE

Respondents adopt Petitioner's Statement of the Case but add the following facts to clarify the issues that are before this Court.

The first beeper was installed inside a can of chemicals which was then traced to Respondent, CASSITY'S home. The beeper was monitored by DEA agents utilizing monitoring equipment that they had in their vehicles and which would allow them to pick up signals within a 2-3 mile radius of their location.

Of the second two (2) beepers, one was placed in another can of chemicals and the second in a heating mantle, which is a piece of laboratory equipment. The second beeper that was located in the second can of chemicals and the first beeper that was in the first can of chemicals were both traced to Respondent, SWORD'S home. This monitoring was again utilized by the DEA and their equipment in their vehicles.

Both beepers in the two cans of chemicals were later monitored as emitting signals from Co-Defendant, DEAN'S residence, where ultimately the search warrant was exe-

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[1] The Government asks this Court to consider it's Motion to Hold Cause in abeyance as a Motion for Rehearing to make it's Petition for Certiorari in this case timely under Rule 20 of the Rules of this Court. The cases cited by Petitioner are inapposite as they involve a Court's interpretation of the substance of motions that were before the same Court. The Court of Appeals in this cause did just that when it denied the Government's Motion for an Order Nunc Pro Tunc treating it's earlier motions as a Petition for Rehearing. Petitioner now asks this Court to overrule the Court of Appeals' procedural ruling, but gives no authority for this unusual request.

A Petition for Certiorari filed with this Court that is not timely should be denied. *Allegrucci* v. *United States*, 372 US 954, 92 L Ed 2d 978, 83 S Ct 950 (1963).

cuted. The monitoring of the two (2) beepers in the cans of chemicals from DEAN'S residence was initiated by the DEA utilizing an airplace with monitoring equipment and then by their using their vehicles to pinpint the location. (R. 28, 507) There was no contemporaneous visual surveillance of the suspected chemicals being transferred to the three (3) residences from where the beeper signals were ultimately monitored by the DEA's equipment.

The third beeper which was located in the heating mantle was not monitored as emitting a signal until it was located at DEAN'S residence. The beeper in the heating mantle was different than the beepers in the cans of chemicals because it was installed in such a manner that when the heating mantle was activated it would activate the beeper and thus tell the DEA agents when the equipment was being utilized.[2]

SUMMARY OF ARGUMENT

In the first appeal of this case, the Court of Appeals decided that a warrant was required for beeper surveillance from non-contraband personal property and that the warrant must have a time limitation. No appeal was taken from that decision of the Court of Appeals by the Government.

In the second appeal of this case, the Court of Appeals ruled on the retroactivity of the exclusionary rule and the applicability of *United States* v. *Knotts*, No. 81-1802 (March 2, 1983), to this case.

Respondents submit that the doctrine of the law of the case precludes the Government from relitigating the time

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[2] Q. (United States Attorney) And those items, how did you come to choose those items to place electronic homing devices in them?

A. These items had been requested by Mr. Cody. There were large quantities that he wanted and—well, the benzene he wanted 30 gallons. So, the only way I could deliver an electronic homing device was in a five-gallon can or bigger. That was one of the five-gallon cans I used, and the heating mantle because we were going to rig that separately and we could tell when it was turned on or turned off or actually plugged in.

limitation requirement of a warrant as an issue in its Petition for Certiorari as this case is before this Court on a second appeal which did not involve that issue.

Respondents submit that the beeper surveillance in this case is factually distinguishable from that in *Knotts* and *United States* v *Karo*, 710 F2d 1433 (10th Cir. 1983), cert. granted, No. 83-850 (Jan. 16, 1984) so as to preclude this case's disposition from being controlled by any decision that this Court may make in the *Karo* case. This case differs from *Knotts* in that there was no contemporaneous surveillance of the movement of the chemicals and equipment which contained the beepers and the beepers were monitored for several days at each of the private residences involved.

Furthermore, one of the beepers in this case was placed on a heating mantle which, when activated, would activate the beeper and thus allow the monitoring agents to be aware of what activity was taking place inside the private dwelling. Thus, the beeper in the heating mantle disclosed not only the location of the equipment but also what activity was taking place within an area which the Respondents had a legitimate expectation of privacy.

ARGUMENT

THE LAW OF THE CASE DOCTRINE PRECLUDES CONSIDERATION BY THIS COURT OF AN ISSUE DECIDED ON THE FIRST APPEAL OF THIS CASE.

In the first appeal of this case, *United States* v. *Cassity*, 631 F2d 461 (6th Cir. 1980), the Court of Appeals utilized its decision in *United States* v. *Bailey*, 628 F2d 928 (6th Cir. 1980), in holding that beeper surveillance may invade an individual's legitimate expectation of privacy and therefore require a warrant. Specifically, the Court of Appeals found that beeper surveillance of non-contraband personal property in private areas trenches upon legitimate expectations of privacy and constitutes a search or seizure within the meaning of the Fourth Amendment, and that a warrant

containing no time limitations does not meet Fourth Amendment requirements.

The first appeal of this case vacated the Judgments of conviction and remanded the case to the trial court for evidentiary hearings on the suppression issue.

The second appeal of this case, *United States* v. *Cassity*, 720 F2d 451 (6th Cir. 1983), involved the issue of the retroactivity of the exclusionary rule to this case and the application of this Court's decision in Knotts, to the facts of this case.

At no time, did the Government appeal the decision of the Court of Appeals in the first appeal that a termination date was required on the beeper warrant. The Government did not seek to bring a Petition for a Writ of Certiorari to this Court from the first appeal or raise the matter in any way on the second appeal of this case, but instead is now raising the matter in this Petition brought after the second appeal. See *United States* v. *Dickinson*, 476 F2d 373 (5th Cir. 1973).

The Court of Appeals holding that the beeper warrant required a termination date is the law of the case and precludes this Court from considering a review of that decision on this second appeal of the same case.

The basis of the doctrine of the law of the case is that:

> . . . " 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its member. [sic] *Roberts* v. *Cooper*, 20 How. [61 U.S.] 467, 481, 15 L Ed 969; and it would be impossible for an appellate court to perform its duties satisfactorily and efficient if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal.' *Great Western Telegraph* v. *Burnham*, 162 U.S. 339, 344, 16 S. Ct. 850, 40 L. Ed. 991.

. . .

'In seeking to reverse the judgment of the District Court, Plaintiff asks us to reverse likewise the prior decision of this Court contrary to the doctrine that the decision of an appellate court in a given case is the law of that case and that no question therein decided will be considered in a subsequent appeal in that case.' " *General American Life Ins. Co.* v. *Anderson*, 156 F2d 615, 618 (6th Cir. 1946).

This Court should not allow Petitioner to relitigate an issue decided adverse to it on the first appeal of this case, when no appeal was taken on that issue.

THE WARRANTLESS MONITORING OF BEEPER SIGNALS IN THIS CASE IS DISTINGUISHABLE FROM KARO AND KNOTTS BECAUSE THE MONITORING IDENTIFIED NOT ONLY THE BEEPERS PRESENCE WITHIN A HOME, BUT ALSO THE ACTIVITY TAKING PLACE WITHIN THE HOME.

In *Knotts*, supra, the Supreme Court held that a person travelling in an automobile on public streets has no reasonable expectation of privacy in his movement from one place to another including the fact of final destination and that Government surveillance by means of a beeper of a person's movements in public is nothing more than the police augmenting their sensory faculties with technological developments. The *Knotts* case is factually and legally distinguishable from the *Bailey* and *Cassity* decisions and does not affect the legal analysis nor conclusions of *Bailey* and *Cassity*. The legal basis for the *Knotts* decision is the diminished expectation of privacy one has in an automobile that is on public streets whereas the legal basis for the *Bailey* and *Cassity* decisions is the guarded expectations of privacy that Courts recognize in private dwellings. Additionally, whatever observations were made in *Knotts* on private property were not inside private dwellings but in the "open fields".

In *Knotts*, a beeper was installed inside a five gallon container of chloroform. Defendant Armstrong placed the chloroform container in an automobile and then proceeded to defendant Petschen's house where the container was transferred to his automobile. That vehicle was then followed, as was the other, by both visual surveillance and a monitor which received signals emitted by the beeper. The automobile at all times was under the visual surveillance of police except for one (1) hour when they terminated their surveillance, but then found the beeper through the use of monitoring equipment in a helicopter. The automobile with the beeper was followed to a cabin at which time no further monitoring was utilized.

In the *Knotts* case, the Court stressed, no less than three times, that no further monitoring of the beeper was made once the beeper came to its end location and that no monitoring was made inside a private residence. The Court stated that 'the record before us does not reveal that the beeper was used after the location in the area of the cabin had been initially determined," and that "nothing in this record indicates that the beeper signal was received or relied upon after it had indicated that the drum containing the chloroform had ended its automotive journey at rest on respondent's premises in rural Wisconsin," and finally that "there is no indication that the beeper was used in any way to reveal information as to the movement of the drum within the cabin or in anyway that would not have been visable to the naked eye from outside the cabin".

The facts of the instant case are highly distinguishable from those in *Knotts* and in fact fall within those areas that the *Knotts* case so carefully pointed out that its facts did not encompass. The location of CASSITY'S residence was exclusively located by the monitoring of the beeper as there was no contemporaneous visual surveillance of the green can arriving at CASSITY'S residence as there was in the *Knotts* case. Unlike *Knotts* where the monitoring ceased once the beeper arrived at its final destination, the agents in

the *Cassity* case continued to monitor the beeper and verified that it stayed at the CASSITY residence for three (3) days. Then again using exclusively monitoring equipment, the agents found the green can to be at the SWORD residence. On August 1st, a second beeper was placed in a blue can of benzene and another beeper was placed in a red heating mantle. There was no visual surveillance or beeper monitoring of the two subsequent beepers directly to the SWORD residence but on August 1st, the monitoring equipment was then used exclusively to monitor the beeper in the blue can of benzene as coming from the SWORD residence. That beeper was then monitored as remaining at the SWORD residence from August 1st to August 11th.

On August 11th, the beeper in the blue can along with the beeper in the green can were monitored at the DEAN residence. Again, no vehicle was visually observed taking the beepers to the DEAN residence, but the location was exclusively ascertained by utilization of monitoring equipment and in fact an aircraft had to be used to find the DEAN residence.

The distinction between *Knotts* and the *Cassity* case is thus clear. In *Knotts*, an automobile with a diminished expectation of privacy was surveilled by use of the beeper and in *Cassity*, three private dwellings were surveilled by use of the beeper. The sanctity of a private dwelling was recognized in *Knotts* where the Court stated "respondent Knotts, the owner of the cabin and surrounding premises to which Petschen drove, undoubtedly had the traditional expectation of privacy within a dwelling place insofar as the cabin was concerned".

Thus in *Cassity*, there was not only a search and seizure of a private dwelling, but there was a continuous search and seizure of an area that the Court has traditionally found to have a legitimate expectation of privacy, to wit: a private dwelling. None of the three private dwellings, the CASSITY, SWORD and DEAN residences surveilled by the beeper were like in *Knotts*, the end destination of an au-

tomobile trip which was visually surveilled to its end destination; and all of the residences, unlike in *Knotts*, were continuously surveilled by the beeper monitoring equipment. Legitimate expectations of privacy were thus violated as to each of the residences and a search or seizure within the meaning of the Fourth Amendment occurred requiring a warrant.

The beeper in the heating mantle was rigged in such a manner that when the heating mantle was activated, the beeper would emit its signal, thus allowing those monitoring the beeper to know when the heating mantle was being used.

The monitoring of the beeper in the heating mantle was, thus, a more egregious search and seizure in a private dwelling than the mere monitoring of the beepers located in the cans of chemicals. The monitoring of the heating mantle not only answered the question of where the heating mantle was, but also what the heating mantle was doing. The beeper thus served as a concealed police presence inside a private dwelling indicating what the activity was that was going on in the private dwelling. For when the beeper on the heating mantle was emitting a signal, the agents would know that the heating mantle was being utilized.

Petitioner asks this Court to dispose of this case in light of its decision in *Karo*.

The Government in its Petition for Certiorari in the *Karo* case stressed that the beeper in *Karo* disclosed only the present location of the can of chemicals and that the beeper tells nothing about the interior of the premises unto which it has been taken other than the fact that it is there.

The beeper in this case however, discloses much more as it also indicates the activity taking place within the home. Petitioner, thus, is in error, when it states in its Petition in this case that the information disclosed by a beeper is extremely limited in scope (a beeper discloses only its own location), and does not change over time.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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